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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-873

JACK HALPERIN,

Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

The petitioner, JACK HALPERIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (attached hereto as Appendix A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals

was entered October 10, 1973, A petition for rehearing was denied on 27th of November, 1973 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the introduction into evidence of the contents of a telephone conversation between the petitioner and a government agent which occurred after indictment violated the self-incrimination provision of the Fifth Amendment and the right of counsel provision of the Sixth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person...shall be compelled in any criminal case to be a witness against himself.";

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.".

STATUTORY PROVISIONS INVOLVED

Title 18, Section 2113(c), United States Code:

> "Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the

same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (B) of this section, shall be subject to the punishment provided by said subsection (B) for the taker.".

STATEMENT OF THE CASE

Prior to the first trial in this cause, Bea Weatherford (Beaty) had given a statement to the Government which was exculpatory with reference to the petitioner's involvement in a bank burglary. Mr. Halperin was convicted for receiving funds from the bank burglary in his first trial, but the conviction was reversed on an evidentiary point. United States v. Halperin, 441 F.2d 612 (5 Cir. 1971). Mr. Halperin was re-indicted and a second trial began on September 11, 1972. That trial resulted in a mistrial because the jury was unable to reach a unanimous verdict. Ms. Weatherford (Beaty) did not testify in either trial. Evidence for the Government consisted of testimony by two of the bank burglars and by two women (one, the companion of the petitioner and the other, a companion of one of the bank burglars). Evidence for the petitioner consisted of testimony by the third bank burglar and the petitioner.

After the second trial, a Special Agent of the Federal Bureau of Investigation contacted Ms. Weatherford (Beaty). After securing a statement incriminating Mr. Halperin, the agent learned that Mr. Halperin had been in contact with Ms. Weatherford. A recording device described as an ordinary cassette recorder was internally attached to her telephone, but she was not encouraged or

discouraged to make contact with the petitioner. Ms. Weatherford testified that she did not advise Mr. Halperin that she had given a different statement to the Government, but had led him to believe that she was still a defense witness.

During Mr. Halperin's cross-examination, the Government read several portions of a telephone conversation recorded by Ms. Weatherford, and a portion of the tape was played in the presence of the jury. The subject matter of the taped conversations included inferences that the petitioner was involved in the bank burglary, that he was paying people to keep him out of the case, that he was providing attorneys to keep witnesses in line, and that he was intimidating witnesses.

Although no objection was made to the taped conversations at the trial, a pre-trial motion to suppress the evidence was denied. The motion alleged that the taped conversations:

> "(A) violates his rights pursuant to the Fifth Amendment...in that the Government actively sought to use the defendant's own statements without notifying him;
>
> (B) violates his rights pursuant to the Fifth and Sixth Amendments ...in that the tapping of the defendant's attempts to locate a witness who had given a favorable statement to his defense...has a chilling effect on the defendant's right to a fair trial...;
>
> (C) violates his rights pursuant to the Fifth Amendment...and the

> concept of fundamental fairness in that the Government actively sought to have the witness Beaty contact the defendant and try to elicit incriminating statements and inferences from him similar to the form of entrapment in Sorrells v. United States, 287 U.S. 435 ... in that it appears that the Government was trying to manufacture the criminal offense of perjury, subornation of perjury, or to manufacture a method by which the defendant would incriminate himself through a Government agents.".

REASONS FOR GRANTING THE WRIT

In Massiah v. United States, 377 U.S. 201 (1964), this Court held that inculpatory statements deceptively elicited from an indicted defendant in the absence of counsel by a co-defendant-Government agent were inadmissible. The decision in Massiah was based upon the Fifth Amendment's self-incrimination provision and the Sixth Amendment's right to counsel provision.[1] Mr. Justice Stewart's opinion for the Court stated:

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[1] Massiah had alleged that his "Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of retained counsel.". 377 U.S. at 204.

> "'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crimes'..." 377 U.S. at 204.

In effect of McLeod v. Ohio, 381 U.S. 356 (1965), was that Massiah commands an absolute right to counsel after indictment, thereby vitiating all statements, whether voluntary or not, made without counsel or valid waiver of counsel. See United States, ex rel. O'Conner v. New Jersey, 405 F. 2d 632 (3 Cir. 1969).

Massiah has been held not to apply in situations of misplaced confidence, i.e., where the incriminating statements were made to a person who was not an agent for the Government, United States, ex rel. Baldwin v. Yeager, 428 F.2d 182 (3 Cir. 1970), United States, ex rel. Milani v. Pate, 425 F.2d 6 (7 Cir. 1970); where the statements were made as part of defense strategy, Mize v. Crouse, 399 F.2d 593 (10 Cir. 1968); where the statements were used as evidence in a case filed after the conversation, United States v. Osser, ____F.2d ____, 13 Cr. L. 2476 (3 Cir. 1973); or where the record clearly reveals the error was harmless, Milton v. Wainwright, 407 U.S. 371 (1972), United States v. Hayles, 471 F.2d 788 (5 Cir. 1973).

None of the above situations apply to Mr. Halperin's case. Where the Government initiates the interview with the witness and attaches a recording device internally to her telephone, and then that witness leads the petitioner to believe that she has not

changed her previous statement given to the Government and could be a defense witness, it cannot be stated that the witness is just an interested citizen.

A similar fact situation is found in United States v. Brown, 466 F.2d 493 (10 Cir. 1972), where, after the defendant had refused to talk with the police, the police persuaded a "friend" of the defendant to secure a confession. The Court of Appeals held that the situation was not a case of misplaced confidence since the friend was functioning as an instrument of the police.

Further, there is absolutely no evidence that the statements were made as part of defense strategy. The statements were used in the case pending against the petitioner when the statements were made and were obviously harmful.[2]

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[2] The complained of evidence, when considered in context with the Government's case, infers that the petitioner was involved in the bank burglary, that he was suborning perjury and that he was obstructing justice by intimidating witnesses. Further, the Government's final argument to the jury made effective use of the evidence:

> "...We might classify this--obstruction of justice. You've seen it and I am here to tell you--I'm here to tell you that that's more serious than most any other crime, most any other thing that can happen, and there's been an abundance of it in this case. That's the effort of this Defendant to threaten witnesses,

(continued on next page)

The issue of guilt in this case has been strongly contested in three trials. One of the trials resulted in a "hung jury". Although the Government enjoyed a slight edge

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2(Cont.)

to induce them to lie in his behalf, and to make them unavailable to appear before you. There's only one reason to obstruct justice and that's to prevent yourself from being found guilty. I don't think it's any clearer, and we heard a lot about this from a number of witnesses--I don't think it's any clearer than in the tape that you heard reference made to--the tape recording of the conversation between the Defendant and Bea Weatherford last Fall where she mentions getting her jaw broken, that too many things are happening to her and she got out of town and went to San Antonio, and the Defendant says, "Yes, you remember when you came to me for your problems, your brake linings". She associated her brake lining problems with her broken jaw, and he said, "You remember you came to me and it stopped?" She told us about it. The words she used, she said, "Halperin told me to stick with him and bad things would quit happening to me". She's done a lot of bad things that she told you about, which I'll say it took a lot of courage to tell you--a lot of courage.". (Argument pp. 12-13).

in the quantity of witnesses, the issue of guilt was not such a closed issue that the error complained of could be held harmless. An affirmative defense was presented which, absent the complained of evidence, may have resulted in a finding of innocence. The record does not clearly reveal harmless error.

Although the exact words used in Massiah were not used in the motion to suppress evidence, the motion sufficiently preserved the error.[3] Further, this Court has apparently considered this issue as plain error. See Beatty v. United States, 389 U.S. 45 (1967), where a conviction was reversed even though the defendant did not raise the objection until the appeal brief was filed.[4]

The Court of Appeals has rendered a decision which is in conflict with the decisions of this Court (Massiah v. United States, supra; McLeod v. Ohio, supra; Beatty v. United States, supra. Further the Court of Appeals' decision

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[3] The failure to object to the actual introduction of the taped conversation at the trial does not waive the error preserved by the motion to suppress evidence. See Gurleski v. United States, 405 F.2d 253, 261 (5 Cir. 1968); Washington v. United States, 401 F.2d 915, 918 (D.C. Cir. 1968).

[4] See Beatty v. United States, 377 F.2d 181, 193, (5 Cir. 1967), dissenting opinion of Judge Ainsworth.

is in conflict with the decisions of other courts of appeals on the same issue (United States v. Brown, supra; United States ex rel, O'Conner v. State of New Jersey, supra).

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(Of Counsel)

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on the same date as shown in the letter of transmittal accompanying this Petition.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1996
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK HALPERIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(October 10, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B
IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1996

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK HALPERIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 10, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 27, 1973)

Before GEWIN, COLEMAN and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that

the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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